



TERRY E. BRANSTAD, GOVERNOR

IOWA UTILITIES BOARD
DEPARTMENT OF COMMERCE

MCLEOD TELEMAGEMENT, INC., PETITIONER, V.
U S WEST COMMUNICATIONS, INC., RESPONDENT

Docket No. FCU-96-1, FCU-96-3

"DECISION AND ORDER"

Issued June 14, 1996

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served this day upon all parties of record in this proceeding by mailing, by first class mail, to each such party a copy thereof, in properly addressed envelope with charges prepaid.

Date: June 14, 1996
Barbara Lee

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: McLEOD TELEMAGEMENT, INC., Petitioner, v. U S WEST COMMUNICATIONS, INC., Respondent.	DOCKET NOS. FCU-96-1 FCU-96-3
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DECISION AND ORDER

(Issued June 14, 1996)

I. PROCEDURAL HISTORY

On February 8, 1996, McLeod Telemanagement, Inc. (McLeod), filed with the Utilities Board (Board) a complaint alleging U S West Communications, Inc. (U S West), had altered the terms and conditions under which Centrex Plus service was provided for resale. McLeod requested expedited interim relief in its complaint. On February 9, 1996, the Board issued an order docketing McLeod's filing as a formal complaint proceeding and setting a hearing on the request for interim relief. The hearing was rescheduled by order dated February 13, 1996. On February 19, 1996, U S West filed a consent to the interim relief requested by McLeod. By order dated February 20, 1996 the Board cancelled the hearing on interim relief and granted interim relief to McLeod.

On February 12, 1996, U S West filed a motion to dismiss the complaint, to which the Consumer Advocate Division of the Department of Justice (Consumer Advocate) and McLeod filed resistances on February 19 and February 22, 1996, respectively.

On February 12, 1996, MCI Metro Access Transmission Services, Inc. (MCImetro), filed a petition to intervene, which the Board granted by order dated February 12, 1996. On February 20, 1996, MCImetro also requested interim relief from the Board. A hearing on this request was scheduled by order dated February 22, 1996, but was cancelled by order dated February 29, 1996, when U S West also filed a consent to the interim relief requested by MCImetro.

On February 16, 1996, AT&T Communications of the Midwest, Inc. (AT&T), filed a petition to intervene, which the Board granted by order dated February 22, 1996, at the same time establishing a procedural schedule leading to hearing on March 20, 1996.

On March 12, 1996, Total Communications Services, Inc. (TCSI), filed a petition to intervene and request for interim relief. On March 18, 1996, U S West filed a response stating it did not object to the interim relief similar to that granted other parties. By order dated March 19, 1996, the Board granted TCSI's petition to intervene and request for interim relief, although TCSI was precluded from presenting new evidence at the hearing scheduled for March 20.

On March 19, 1996, U S West filed a motion for continuance of the hearing scheduled for March 20, asserting it had reached agreement with McLeod over the substance of the complaint and also asserting the parties needed time to consider their positions in light of McLeod's withdrawal. The Board granted U S West's motion by order dated March 20, 1996. On March 20, 1996, McLeod filed a withdrawal of its complaint.

On March 21, 1996, MCImetro filed with the Board a complaint against U S West which essentially repeated the same allegations McLeod had asserted in its original complaint. On April 1, 1996, the Board docketed MCImetro's complaint as Docket No. FCU-96-3, consolidated it with Docket No. FCU-96-1, and established a procedural schedule.

On April 9, 1996, U S West filed a motion to dismiss MCImetro's complaint. On April 23, 1996, MCImetro filed a resistance to the motion to dismiss, incorporated by reference the arguments made previously by Consumer Advocate and McLeod in Docket No. FCU-96-1. U S West's motion to dismiss was denied by order dated May 8, 1996.

On May 2, 1996, TCSI filed a withdrawal of its petition to intervene in Docket No. FCU-96-1.

II. UNDERLYING FACTS

On February 5, 1996, U S West made two changes to the catalog under which it provided Centrex Plus, a deregulated service. (Tr. 64, 260; Ex. 301). First, it indicated Centrex Plus service would no longer be available to customers that did not already subscribe to the service. (Tr. 119, 157; Exs. 1, 4). Second, while Centrex Plus service would be available to existing customers until April 29, 2005, customers would be restricted from adding new common blocks, from adding more than 20 locations annually on each existing common block, and from adding more than a prescribed number of station lines on existing common blocks. (Tr. 119, 158; Exs. 1, 4). Customers with 1-100 station lines would be allowed to double their station lines annually, while customers with more than 100 station lines could double the number of station lines only every two years. (Tr. 119-20; Exs. 1, 4). U S West was not motivated by technological reasons to withdraw Centrex Plus service. (Tr. 232). U S West expects a replacement product to be available in Iowa in September depending on testing results. (Tr. 159-60, 202-03, 263-68).

All of U S West's Iowa Centrex Plus customers were affected in the same fashion by the catalog changes. (Tr. 63, 73, 149). Among these customers were McLeod, TCSI, and MCImetro. (Tr. 13; Exs. 100, 302). These three companies were reselling U S West's Centrex Plus service to provide local exchange service to their own customers. McLeod, TCSI, and MCImetro were reselling U S West Centrex Plus service because it provided the means to gain entry into the

competitive local exchange services market by resale of services rather than by the alternative method, which is construction of an independent facilities-based network. (Tr. 18, 51, 74, 280; Ex. 300-A).

After the Centrex Plus catalog changes were announced, McLeod and TCSI entered into confidential agreements with U S West to obtain Centrex Plus service on less restrictive terms. (Ex. 303). MCImetro was still bound by the Centrex Plus catalog terms. AT&T, which was not certificated to provide local exchange services in Iowa at the time the catalog changes were made, will be precluded by the terms of the changes to the catalog from obtaining Centrex Plus service to offer local exchange services as a reseller. (Tr. 167, 192-93, 281).

III. ANALYSIS

MCImetro and AT&T, and the Consumer Advocate contended U S West's acts to restrict Centrex Plus Service violate various provisions of the federal Telecommunications Act of 1996, degrade the quality of service U S West provided to resellers, is discriminatory, and anticompetitive. The Board need not determine whether violations of the Telecommunications Act occurred. Rather, the Board's decision is limited to consideration of U S West's compliance with IOWA CODE §§ 476.100(1), 476.100(7), and 476.101(7). (1995 Iowa Supp.).

A. IOWA CODE § 476.100(1)

Subsection 476.100(1) (1995 Supp.) provides:

Prohibited acts. A local exchange carrier shall not do any of the following:

1. Discriminate against another provider of communications services by refusing or delaying access to the local exchange carrier's services.

While the changed catalog terms apply equally to all of U S West's Iowa Centrex Plus customers, the impact on those reselling Centrex Plus to provide local service is different. The effects of these changes restrict growth potential for reselling customers and eliminate the opportunity for a new competitive local exchange carrier to enter the local exchange market unless it constructs its own facilities-based network. The changes render the service useless for purposes of resale. The Board considers this action to constitute in effect a refusal or delay in access to U S West's services, a violation of IOWA CODE § 476.100(1).

B. IOWA CODE § 476.101(7)

Subsection 476.101(7) (1995 Iowa Supp.) provides:

Local exchange competition.

7. Except as provided under section 476.29, subsection 2, and this section, the board shall not impose or allow a local exchange carrier to impose restrictions on the resale of local exchange services, functions or capabilities. The board may prohibit residential service from being resold as a different class of service.

The catalog changes appear to allow resale of the described service. However, the Board must also consider the total effect of the course of conduct by U S West in changing the terms of the offering. Measuring that course of conduct against IOWA CODE § 476.101(7), the changes U S West made to its Centrex Plus

catalog substantially restrict the growth potential of McLeod, MCImetro, and TCSI as resellers and eliminate the possibility of resale of Centrex Plus service to future resellers such as AT&T at a time when no equivalent service is available. Although the subsequent agreements U S West entered into with McLeod and TCSI lessened the restrictions, Centrex Plus service continued to be available to them only on a more restrictive basis than previously offered; Centrex Plus service continued to be available to MCImetro only on the basis of the catalog changes. The course of conduct of U S West evidenced by both the catalog changes and the subsequent agreements with McLeod and TCSI resulted in restrictions on the resale of Centrex Plus local exchange service. The effect of these changes was to allow U S West to gain control over the degree to which its competitors could grow and to lock out potential resale competitors. U S West thus violated IOWA CODE § 476.101(7).

C. IOWA CODE § 476.100(7)

Subsections 476.100(7) (1995 Supp.) provides:

Prohibited acts. A local exchange carrier shall not do any of the following:

7. Discriminate in favor of itself or an affiliate in the provision and pricing of, or extension of credit for, any telephone service.

Subsequent to the catalog changes noted above, U S West entered into separate agreements with McLeod and TCSI regarding their continued use of Centrex Plus. The effect of these agreements gave McLeod and TCSI the ability to

use Centrex Plus on terms that were less restrictive than the catalog terms under which MCImetro continued to operate. By this conduct, U S West favored the resellers of its choice to the disadvantage of others, thus violating IOWA CODE § 476.100(7).

The Board does not mean to suggest by this analysis U S West can never discontinue a service which is resold by its competitors. However, the manner of discontinuance must produce effects that are consistent with the procompetitive requirements of IOWA CODE §§ 476.100 and 476.101. U S West's catalog changes restrict the growth potential of its competitors and preclude others from competing just when competitive options are becoming available. Since no other resale options are currently available, the catalog changes control and stop efforts to provide choice in local telephone service. The effect is contrary to the development of competition in telecommunications markets and therefore, contrary to the legislative intent expressed in IOWA CODE § 476.95(2) (1995 Supp.). Accordingly, U S West will be required to continue to offer Centrex Plus service without the proposed catalog changes to all current and prospective customers in Iowa. This requirement will continue until the Board has approved an alternative service offering by U S West which will encourage the development of local exchange competition in Iowa, will satisfy the requirements of IOWA CODE §§ 476.100 and 476.101, and will not be inconsistent with the Telecommunications Act of 1996.

IV. FINDINGS OF FACT

1. At all times material to this case, U S West was a local exchange carrier as that term is defined in IOWA CODE §§ 476.100 and 476.101 (1995 Iowa Supp.).

2. U S West furnished Centrex Plus, a deregulated local exchange service in Iowa, to McLeod, TCSI, and MCImetro. McLeod, TCSI, and MCImetro resold Centrex Plus service to their own customers. The terms and conditions under which McLeod, TCSI, and MCImetro received the service were described in the U S West Centrex Plus catalog.

3. On February 5, 1996, U S West made changes to the Centrex Plus catalog, altering the terms and conditions under which the service was made available to all existing end-user customers and resale customers. U S West announced it would no longer provide Centrex Plus to new customers.

4. The catalog changes made by U S West did not have the effect of degrading the technical quality of Centrex Plus service.

5. Subsequent to these changes regarding Centrex Plus service, U S West entered into separate agreements with McLeod and TCSI which made Centrex Plus service available to them under less restrictive terms and conditions than those contained in the catalog as revised.

6. The development of competition in the local exchange market will be furthered by requiring U S West to provide Centrex Plus service without restrictions

until it has developed a replacement service which has been approved by the Board.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter of Docket Nos. FCU-96-1 and FCU-96-3, pursuant to IOWA CODE § 476.101(8) (1995 Supp.).
2. The Board has the authority to examine U S West's entire course of conduct concerning this complaint to determine whether U S West violated IOWA CODE §§ 476.100(1), 476.100(7), and 476.101(7).
3. By precluding the availability of Centrex Plus service for new customers, U S West discriminated against AT&T in violation of IOWA CODE § 476.100(1) (1995 Supp.).
4. U S West's catalog changes, combined with its subsequent agreements with McLeod and TCSI, restricted the access of McLeod, TCSI, and MCImetro and precluded the access of AT&T to Centrex Plus local exchange service for resale in violation of IOWA CODE § 476.101(7) (1995 Supp.).
5. By making subsequent agreements with McLeod and TCSI which gave them access to Centrex Plus service under less restrictive terms than the catalog changes which bound other resellers, U S West discriminated in favor of itself in violation of IOWA CODE § 476.100(7) (1995 Supp.).

VI. ORDERING CLAUSES

U S West Communications, Inc., shall remove the Centrex Plus catalog changes made on February 5, 1996, concerning service to all current and prospective customers in Iowa until the Board has approved an alternative service offering by U S West which will encourage the development of local exchange competition in Iowa, will satisfy the requirements of IOWA CODE §§ 476.100 and 476.101, and will not be inconsistent with the Telecommunications Act of 1996.

UTILITIES BOARD

Nancy S. Boyd
Sumit J. Khanna, Jr.

DISSENT AND SPECIAL CONCURRENCE

I concur with the decision, except for the reasoning in parts A and B and conclusions of law 3 and 4. I do not join in those portions.

John A. Brown

ATTEST:

Raymond H. Vander
Executive Secretary

Dated at Des Moines, Iowa, this 14th day of June, 1996.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

US WEST COMMUNICATIONS, INC.,

Petitioner,

vs.

IOWA STATE UTILITIES BOARD,

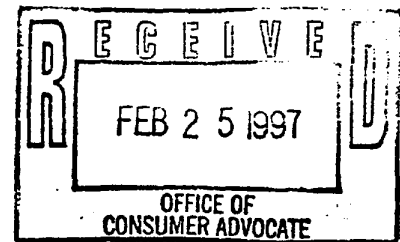
Respondent.

OFFICE OF CONSUMER ADVOCATE, MCI
METRO ACCESS TRANSMISSION
SERVICES, INC., AT&T COMMUNICATIONS
of the MIDWEST, INC.,

Intervenors.

NO. AA-2783

RULING ON PETITION FOR
JUDICIAL REVIEW



On January 3, 1997, Petitioner's Petition for Judicial Review came on for hearing. Petitioner, US West Communications, Inc. ("US West"), appeared through counsel, Robert F. Holz, Jr. Respondent, Iowa State Utilities Board ("Board"), appeared through counsel, Allan Kniep. Intervenor, Office of Consumer Advocate ("OCA"), appeared through counsel, Kirk L. Peterson. Intervenor, MCI Metro Access Transmission Services, Inc. ("MCImetro"), appeared through counsel, Philip Stoffregen. Intervenor, AT&T Communications of the Midwest, Inc. ("AT&T"), appeared through counsel, Richard W. Lozier, Jr. After reviewing the record and hearing arguments of counsel, the Court enters the following:

I. STATEMENT OF THE CASE

In this judicial review proceeding, US West seeks reversal of the Board's decision in In Re: McLeod TeleManagement, Inc., FCU-96-1 and FCU-96-3 (consolidated). The Intervenor in this case seek to have the Board's decision affirmed.

McLeod TeleManagement, Inc. ("McLeod") filed an action against US West with the Board on February 8, 1996, docketed as FCU-96-1, alleging that US West had altered the terms and conditions under which Centrex Plus service was provided for resale and that those changes were in violation of Iowa Code Sections 476.100, subsections 1, 2, 3, and 7, as well as Iowa Code Section 476.101(7). McLeod requested expedited interim relief in its complaint, and a hearing was set on the request for interim relief. US West filed a Motion to Dismiss McLeod's complaint on February 12, 1996. That motion was resisted by both McLeod and the OCA. On February 19, 1996, US West filed a consent to the interim relief requested by McLeod. The Board subsequently canceled the hearing on interim relief and issued an order dated February 20, 1996, granting interim relief to McLeod.

MCImetro and AT&T filed petitions to intervene in the proceedings, both of which were granted by the Board. MCImetro requested interim relief from the Board on February 20, 1996. The scheduled hearing was canceled on February 29, 1996, when US West filed a consent to the interim relief requested by MCImetro.

In March, 1996, Total Communication Services, Inc. ("TCSI") filed a petition to intervene and a request for interim relief. US West filed a response stating that it did not object to interim relief similar to that granted to the other parties. On March 19, 1996, the Board granted TCSI's petition for intervention and request for interim relief. However, the Board stated TCSI was precluded from presenting new evidence at the hearing scheduled for March 20, 1996. That same date, US West filed a motion for continuance, asserting that it had reached an agreement with McLeod concerning the substance of the complaint. On March 20, 1996, McLeod filed a withdrawal of its complaint. TCSI also reached agreement with US West concerning the substance of its complaints and withdrew its

petition for intervention on May 2, 1996.

On March 21, 1996, MCImetro filed a complaint with the Board against US West which essentially repeated the same allegations McLeod had asserted in the original complaint. The Board docketed MCImetro's complaint as FCU-96-3 on April 1, 1996, and consolidated it with FCU-96-1. US West filed a motion to dismiss MCImetro's complaint. That motion was resisted by MCImetro. The Board denied US West's motion to dismiss on May 8, 1996.

The Board issued its Final Decision and Order in this case on June 14, 1996, finding in favor of the petitioners/intervenors and ordering US West to remove the changes made on February 5, 1996, to the Centrex Plus catalog for all current and prospective customers in Iowa until the Board had approved an alternative service. US West now seeks judicial review of that decision and the Board's denial of its motion to dismiss.

II. STATEMENT OF THE FACTS

Centrex Plus is a business communication system furnished to large companies via a stored program located in US West's central switching equipment. US West offers Centrex Plus in several states as an alternative to the privately owned PBX systems many large organizations use to route calls. Centrex Plus provides features and functions similar to those of a PBX system. Centrex Plus provides certain standard features to all telephones. Other optional features may be added to individual telephones as needed.

The Board deregulated Centrex Plus and its features in 1985 in In Re: Northwestern Bell Telephone Company, Docket No. RPU-84-8. Prior to the enactment of H.F. 518 in 1995, the Board ruled it had no jurisdiction to resolve complaints resulting from the provision of Centrex Plus and its features. See In Re: McLeod TeleManagement, Inc., Docket No.

DRU-95-1. US West does not file tariffs with the Board concerning Centrex Plus. Instead, it lists the rates, terms and conditions for Centrex Plus and its features in a service catalog. That catalog is not filed with the Board nor subject to Board approval. US West contends since Centrex Plus is a deregulated service, the Board has no jurisdiction to hear complaints, even after the passage of H.F. 518.

McLeod's complaint before the Board centered on the changes made by US West to its Centrex Plus catalog on February 5, 1996. The changes made by US West included restricting availability of the service to current subscribers, barring the addition of new common blocks for those customers, limiting the addition of new locations on the existing common blocks to twenty new locations per year, and restricting the addition of more station lines to the common blocks. Subscribers who had 100 or less station lines could double the number of station lines annually, while those with greater than 100 lines could double the number of lines only every two years. According to US West, these changes were made in an attempt to phase out Centrex Plus service by April 29, 2005. US West plans to replace Centrex Plus with another service which will offer enhanced capabilities for video and data transmission, not just the voice capabilities offered by Centrex Plus. At the time of the Board proceedings, US West anticipated unveiling that service in Iowa in September, 1996.

All of US West's Centrex Plus customers in Iowa were affected in the same manner by the catalog changes. This included resellers of the service such as McLeod, TCSI and MCImetro. The resellers of Centrex Plus use it to provide local exchange service to their own customers via resale of the service rather than by construction of their own facilities. Two of those resellers, McLeod and TCSI, entered into confidential agreements with US

West to obtain Centrex Plus services on a less restrictive basis than those announced by US West on February 5, 1996. Those agreements resulted in the withdrawal of their actions before the Board. MCImetro did not enter into such an agreement with US West and remained bound by the announced terms. Under the February 5, 1996, changes to US West's catalog, AT&T was precluded from offering Centrex Plus service as a reseller because it had not yet been certified to provide local exchange services in Iowa.

In its Decision and Order filed June 14, 1996, the Board stated it had jurisdiction over the proceedings pursuant to Iowa Code Section 476.101(8). The Board found that US West's actions in changing their Centrex Plus catalog were in violation of Iowa Code Sections 476.100(1), 476.100(7), and 476.101(7) as the changes had the effect of restricting the growth potential of their competitors and were contrary to the legislative intent of Iowa Code Section 476.95(2).

On July 12, 1996, US West filed this action for judicial review of the Board's May 9, 1996, Order Denying Motion to Dismiss and its Decision and Order dated June 14, 1996. MCImetro intervened on July 16, 1996, and joined with the Board in this action. AT&T intervened on July 23rd, and the OCA intervened on July 30, 1996. In addition to the assertions that US West's actions violated Iowa statutes, AT&T suggests the actions were in violation of the Federal Telecommunications Act of 1996. This Court will not address that issue as the Board specifically declined to consider the matter.

III. STANDARD OF REVIEW

On judicial review of an agency action, the district court functions in an appellate capacity to apply the standards of Iowa Code Section 17A.19(8)(1995). Iowa Planners Network v. Iowa State Commerce Commission, 373 N.W.2d 106, 108 (Iowa 1985). The

Court has no original authority to declare the rights of the parties. Office of Consumer Advocate v. Iowa State Commerce Commission, 432 N.W.2d 148, 156 (Iowa 1988). Nearly all disputes in the field of administrative law are won or lost at the agency level. Iowa-Illinois Gas and Electric Co. v. Iowa State Commerce Commission, 412 N.W.2d 600, 604 (Iowa 1987). Judicial review of agency action is confined to correction of errors of law. Farmers Coop Oil Ass'n v. Den Hartog, 475 N.W.2d 7, 9 (Iowa App. 1991). This is particularly true in the highly technical field of public utility rate regulation. Office of Consumer Advocate v. Iowa State Commerce Commission, supra, 432 N.W.2d at 152.

Iowa Code Section 17A.19(8)(b)(1995) provides the Court may reverse an agency action that is in excess of the statutory authority of the agency. An administrative agency has no inherent power and has only such jurisdiction and authority as expressly conferred by statute or necessarily inferred from the power expressly granted. Iowa Power and Light Co. v. Iowa State Commerce Commission, 410 N.W.2d 236, 240 (Iowa 1987). An agency action beyond the statutory authority of the agency is an error of law which should be corrected by the Court on judicial review. Northwestern Bell Telephone Co. v. Iowa Utilities Board, 477 N.W.2d 678, 682 (Iowa 1991)(citing Schmidt v. State Board of Dental Examiners, 423 N.W.2d 19, 21 (Iowa 1989).

An agency action that is affected by an error of law or violative of constitutional or statutory provisions is subject to reversal under Iowa Code Section 17A.19(8)(a) and (e). Northwestern Bell Telephone Co., supra. The Court will intercede to determine constitutional matters. Davenport Water Co. v. Iowa State Commerce Commission, 190 N.W.2d 583, 592 (Iowa 1971). In deciding whether the agency made errors of law, the Court gives weight to the agency's construction of its statute but is not bound by it.

Woodbine Community School District v. P.E.R.B., 316 N.W.2d 862, 864 (Iowa 1982). It is the duty of the Court to determine matters of law including the interpretation of a statute or agency rule interpreting a statute. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 10 (Iowa 1982).

Violation of an agency rule is reversible error under Iowa Code Section 17A.19(8)(c)(1995). The Court gives an administrative agency a reasonable range of informed discretion in the interpretation and application of its own administrative rules. Meads v. Iowa Department of Social Services, 366 N.W.2d 555, 558 (Iowa 1985). But the Court is not bound by the agency's determinations concerning administrative rules. Cosper, *supra*. The Court will not defer to an agency interpretation that is plainly inconsistent with its rule or plainly erroneous. Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470, 475 (Iowa 1983).

Iowa Code Section 17A.19(8)(g)(1995) provides the Court may reverse an agency action that is unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Unreasonableness is defined as an action in the face of the evidence to which there is no room for difference of opinion among reasonable minds or action not based upon substantial evidence. The agency is free to exercise its expertise within a reasonable range of informed discretion. Office of Consumer Advocate v. Iowa State Commerce Commission, 419 N.W.2d 373, 374 (Iowa 1988). Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent. Ashmead v. Harris, 336 N.W.2d 197, 199 (Iowa 1983). Arbitrary and capricious are practically synonymous. Both refer to agency action taken without regard to law or the facts of the case. Office of Consumer Advocate v. Iowa State

Commerce Commission, supra, 432 N.W.2d at 154. The Court will affirm the agency decision if it bears a reasonable relationship to the law and the evidence.

Iowa Code Section 17A.19(8)(f)(1995) provides that, in a contested case, the court shall grant relief from an agency decision which is unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole. Neil v. John Deere Component Works, 490 N.W.2d 80, 82 (Iowa App. 1992). Review is not de novo. Hussein v. Tama Meat Packing Corp., 394 N.W.2d 340, 341 (Iowa 1986). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion even though a reviewing court might reach a contrary inference. Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 811-12 (Iowa 1985); Langley v. Employment Appeal Board, 490 N.W.2d 300, 302 (Iowa App. 1992). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Neil, 490 N.W.2d at 82-83; Langley, 490 N.W.2d at 302. The mere possibility the record might support another conclusion does not permit the reviewing court to make a finding inconsistent with the agency finding so long as there is substantial evidence to support it. City of Davenport v. P.E.R.B., 264 N.W.2d 306, 311-12, 96 A.L.R. 698 (Iowa 1978).

In determining whether substantial evidence exists, the court is to consider all the evidence together, including the body of evidence opposed to the agency's review. Burns v. Board of Nursing, 495 N.W.2d 698, 699 (Iowa 1993). In considering all the evidence, including that offered in opposition to the agency's finding, the court does not compromise the limitation of its scope of review. Id. When review is not de novo, the reviewing court must not usurp the fact finding function of the agency. The agency decision should be

affirmed when there is no error of law and the decision is supported by substantial evidence. Heatherly v. Iowa Department of Job Service, 397 N.W.2d 670 (Iowa 1986).

IV. STATEMENT OF ISSUES

The following issues are presented by US West's Petition for Judicial Review:

A. Whether the Board acted in excess of its statutory authority in failing to dismiss the action for lack of jurisdiction.

B. Whether the Board's conclusions that the actions of US West violated Iowa Code Sections 476.100(1), 476.100(7) and 476.101(7) (1995 Supp.) are supported by substantial evidence, are unreasonable, arbitrary and capricious, or are affected by other error of law.

V. ANALYSIS

A. Jurisdiction

US West contends the Board exceeded its statutory authority because it does not have jurisdiction to adjudicate the dispute between US West and MCImetro. Since Centrex Plus is a deregulated service under Iowa Code Section 476.1D, US West argues the Board has no jurisdiction over disputes arising from this service. See, Iowa Code Section 476.1D(1) (1995). In 1995, the Iowa legislature amended chapter 476 via H.F. 518, adding sections 476.95 through 476.102 to the Code. US West alleges the changes made by H.F. 518 do not grant the Board jurisdiction over complaints relating to a previously deregulated service such as Centrex Plus.

The question is whether Iowa Code Chapter 476, as amended by H.F. 518, authorizes the Board to exercise jurisdiction over complaints a local exchange carrier engaged in prohibited acts in providing a deregulated service to a competitor. The Board and the Intervenors state this jurisdiction is provided in Iowa Code Section 476.101(8) (1995

Supp.).

Prior to H.F. 518, the Board held it had no jurisdiction to decide complaints concerning the deregulated Centrex Plus service due to the constraints of Iowa Code Section 476.1D(1) (1995). See In Re: McLeod TeleManagement, Inc., Docket No. DRU-95-

1. Section 476.1D(1) provides:

Except as provided in this section, the jurisdiction of the board as to the regulation of communication services is not applicable to a service or facility that is provided or is proposed to be provided by a telephone utility that is or becomes subject to effective competition, as determined by the board. In determining whether a service or facility is or becomes subject to effective competition, the board shall consider, among other factors, whether a comparable service or facility is available from a supplier other than the telephone utility and whether market forces are sufficient to assure just and reasonable rates without regulation.

Section 476.1D was implemented to provide the Board a mechanism for transition from rate regulation of monopolistic services of local exchange carriers to effective market based competition among local exchange carriers. This wave of deregulation led to radical changes in the telecommunications industry. However, the legislature determined that additional changes were necessary to ensure the telecommunications industry became fully competitive and enacted H.F. 518. Iowa Code Section 476.95 (1995 Supp.) (H.F. 518, §6) enunciates the public policy of the State of Iowa:

The general assembly finds all of the following:

1. Communications services should be available throughout the state at just, reasonable, and affordable rates from a variety of providers.
2. In rendering decisions with respect to regulation of telecommunications companies, the board shall consider the effects of its decisions on competition in telecommunications

markets and, to the extent reasonable and lawful, shall act to further the development of competition in those markets. . .

Iowa Code Sections 476.100 and 476.101 (H.F. 518, §§11 and 12), delineate certain prohibited acts for local exchange carriers and establish laws designed to promote competition. Section 476.101(8) provides:

8. Any person may file a written complaint with the board requesting the board to determine compliance by a local exchange carrier with the provisions of Sections 476.96 through 476.100 [prohibited acts], 476.102, and this section, or any board rules implementing those sections. . . (Emphasis added).

Through Section 476.101(8), the legislature authorized the Board to exercise jurisdiction over complaints that a local exchange carrier engaged in a prohibited act regarding the provision of telecommunication services.

US West argues the jurisdiction provided by Section 476.101(8) extends only to services that have not been deregulated pursuant to Section 476.1D. The Board and Intervenor contend US West's construction of the statute would render portions H.F. 518 meaningless by severely restricting the applicability and effectiveness of sections 11 and 12 of H.F. 518 (Iowa Code §§ 476.100 and 476.101 (1995 Supp.)) and would defeat the procompetitive purposes of Iowa Code Section 476.95. They rely on Section 476.101(8) to provide complaint jurisdiction over deregulated services.

The resolution of this issue turns on the construction of Iowa Code Ch. 476 including Section 476.101(8). In construing statutes, the Court properly considers both the language of the act and the objects sought to be attained by the legislature. GTE North v. Iowa State Utilities Board, 473 N.W.2d 48, 51 (Iowa 1991). The entire act must be considered. Each section must be construed with the act as a whole. All parts of the act must be construed

together. The statute must be accorded a sensible, practical, workable and logical construction. State v. Harrison, 325 N.W.2d 770, 772 (Iowa App. 1982). The Court will seek a reasonable interpretation of the Board's complaint jurisdiction under Section 476.101(8) that will best effect the purpose of the statute and avoid an absurd result. John Deere Dubuque Works of Deere & Co. v. Weyant, 442 N.W.2d 101, 104 (Iowa 1989).

In section 6 of H.F. 518 (Iowa Code Section 476.95 (1995 Supp.)), the legislature stated its intent to promote competition in telecommunications markets in Iowa. The object sought to be obtained by the legislature through enactment of both Sections 476.1D(1) and 476.101(8) is market based competition among local exchange carriers. The legislature promoted competition first through deregulation under Section 476.1D and later through proscription of prohibited acts in Section 476.100. If the legislature intended to extend the prohibition of Section 476.100 only to rate and service regulated utilities, it would have said so. It did not. To hold the complaint jurisdiction of Section 476.101(8) extends only to regulated services would produce the absurd result of depriving the Board of authority to enforce the procompetitive provisions of H.F. 518. US West's interpretation is not consistent with the procompetitive intent of the legislature.

This Court concludes the Board acted within its statutory authority granted by Section 476.101(8) in exercising jurisdiction over the complaint concerning deregulated Centrex Plus service provided by US West. The Board's decision does not affect the deregulation of Centrex services. US West is not required to file tariffs for Centrex Plus nor to seek regulatory approval of the service. The Board's exercise of complaint jurisdiction over Centrex service is consistent with the legislative intent expressed in Iowa Code Section 476.95 and promotes the shift toward effective competition contemplated in Section

476.1D(1). The Board properly overruled US West's motion to dismiss and assumed jurisdiction over the complaint.

B. Statutory Violations

In its Decision and Order dated June 14, 1996, the Board found (1) US West's actions discriminated against AT&T in violation of Iowa Code Section 476.100(1) by precluding the availability of Centrex Plus to new customers; (2) the catalog changes, combined with the agreements between US West, McLeod and TCSI, violated Iowa Code Section 476.101(7) by restricting access to Centrex Plus by McLeod, TCSI, and MCImetro and precluding access to Centrex Plus by AT&T; and (3) by making agreements with McLeod and TCSI on less restrictive terms than those binding other resellers, US West discriminated in favor of itself in violation of Iowa Code Section 476.100(7). US West contends these conclusions are unsupported by substantial evidence, are unreasonable, arbitrary and capricious, or are affected by other errors of law. The Board and Intervenors believe that the Board's decision is amply supported by substantial evidence in the record and that it is not contrary to any of the requirements of Iowa Code Section 17A.19(8) (1995).

1. Discrimination Against AT&T in Violation of Iowa Code Section 476.100(1).

Iowa Code Section 476.100(1) (1995 Supp.) provides that a local exchange carrier shall not:

1. Discriminate against another provider of communications services by refusing or delaying access to the local exchange carrier's services.

Discrimination may take many forms. It may be either direct or indirect, obvious or subtle, and may impact on some parties greater than others. The Board found that US

West discriminated against AT&T in violation of this section of the statute when it made the catalog changes to Centrex Plus on February 5, 1996. The Board stated:

While the changed catalog terms apply equally to all of US West's Iowa Centrex Plus customers, the impact on those reselling Centrex Plus to provide local service is different. The effects of these changes restrict growth potential for reselling customers and eliminate the opportunity for a new competitive local exchange carrier to enter the local exchange market unless it constructs its own facilities-based network. The changes render the service useless for the purposes of resale.

In Re: McLeod TeleManagement, Inc., Docket Nos. FCU-96-1 & FCU-96-3, Decision and Order, p. 6 (June 14, 1996).

In its Findings of Fact, the Board found that US West's agreements with McLeod and TCSI "made Centrex Plus service available to them under less restrictive terms and conditions than those contained in the catalog as revised." Id. p. 9.

The changes made by US West included limiting the availability of Centrex Plus to "current Centrex Plus customers" under certain key conditions until April 29, 2005. (Tr. p. 118). US West defined "current Centrex Plus customers" as:

1. Those Centrex Plus customers of record as of February 5, 1996;
2. Those customers to whom US West had presented a written offer, documented proposal, or Request for Proposal (RFP) response on or before February 5, 1996, which terminates on or before May 5, 1996; or
3. Those customers who have signed a contract or for whom a service order was issued on or before February 5, 1996, and whose service had not yet been installed.

(Tr. p. 118).

The "key conditions" applicable to the "current Centrex Plus customers" after February 5, 1996, were:

1. Waiver of Termination Liability Charges. Centrex Plus customers are allowed to convert to other US West services such as PBX trunks, 1FB and

ISDN without a Centrex Plus termination liability charge or non-recurring charges to convert to another US West service.

2. Common Blocks. Centrex Plus customers may not add additional common blocks beyond those on record or identified in an authorized US West proposal as of February 5, 1996. Centrex Plus customers may vacate and move locations which may require a common block to be changed. However, no additional common blocks may be gained as a result of the move.

3. Additional Locations. Centrex Plus customers may add up to 20 additional locations annually for each of their common blocks. The only exception is that a Centrex Plus customer may initially add more than 20 locations to its preexisting Centrex Plus system if the Centrex Plus customer has acquired another system. This exception also applies to realignments between government entities. Following the initial acquisition of government realignment, any additional growth is limited to 20 new locations annually per common block.

4. Station Lines. Centrex Plus customers may move, add or change station lines and optional features at existing locations until the customer converts to another service, their Centrex Plus service contract expires or until April 29, 2005. Centrex Plus customers with 1 to 100 station lines may add up to 100% of their current lines annually for each common block. Centrex Plus customers with 101 or more station lines may add up to 100% of their current station lines every two years for each common block. In neither instance are station lines compounded for purposes of calculating future growth.

5. Assignments. Existing Centrex Plus systems may be assigned subject to the assignee being bound by the key terms set forth above.

(Tr. pp. 118-120).

According to US West, those "key conditions" were designed to reflect the typical growth and utilization patterns of the medium and large business and government end-user customers for which Centrex Plus was designed. (Tr. p. 120).

It is undisputed that AT&T did not fit the definition of a "current Centrex Plus customer". US West suggests that it is no longer required to offer Centrex Plus service for resale to new customers as the service is no longer offered to retail customers. A US West

representative, Perry W. Hooks, Jr., testified:

ATTORNEY LOZIER: Mr. Hooks, on page 4 of your direct testimony you use the term "current Centrex Plus customers" at line 14, and my question is whether AT&T meets that definition as you use it there?

THE WITNESS: No, it does not.

ATTORNEY LOZIER: Is the effect of your definition then, then, that AT&T will not ever be able to purchase Centrex Plus services from US West for resale?

THE WITNESS: Centrex Plus is not an offering of US West at this time.

ATTORNEY LOZIER: Will AT&T ever be able to purchase Centrex Plus services for resale?

THE WITNESS: The service is not offered, so by definition it would not be available for resale.

ATTORNEY LOZIER: Can AT&T buy it?

THE WITNESS: The service is not offered; therefore, they could not buy the service.

(Tr. pp. 190-191).

The language of the statute is clear. A local exchange carrier may not "discriminate against another provider of communications services by refusing or delaying access to the local exchange carrier's services." Nothing in the language of the statute limits its provisions to only services being actively offered for sale. US West's proposal does not require Centrex Plus to be phased out until the year 2005, over nine years from the date US West implemented the changes to the Centrex Plus catalog. The changes allow current customers to expand their service and even to renew contracts.

While US West is correct that nothing in Iowa Code Section 476.100(1) prohibits

them from withdrawing a product from the market, that withdrawal may not result in discrimination towards a reseller. US West's attempts to distinguish between services "offered" for sale and those "provided" to current customers are unpersuasive. The "key conditions" under which US West is grandparenting the service effectively shut out potential competitors who do not already subscribe to the Centrex Plus service and inhibit the growth of resellers who may need to add common blocks, locations, and additional station lines in order to freely compete in the market. Resellers are more likely to be hurt by those restrictions than end-user customers whose needs do not expand as quickly. Whether Centrex Plus was designed for end-user applications or for resale is unimportant. The reality is that Centrex Plus is being resold. The needs of those customers must also be considered when phasing out a product. As long as US West provides a service to any customer, they may not discriminate in providing the service. US West's actions are clearly inconsistent with the procompetitive purposes of the statute.

The Board correctly concluded that US West effectively refused or delayed access to Centrex Plus in violation of Iowa Code Section 476.100(1). The Board's decision is supported by substantial evidence and is correct as a matter of law.

2. Restrictions on Resale in Violation of Iowa Code Section 476.101(7).

Pursuant to Iowa Code Section 476.101(7) (1995 Supp.), a local exchange carrier may not restrict the resale of any local exchange service, function, or capability:

7. Except as provided under section 476.29, subsection 2¹, and this section, the board shall not impose or allow a local

¹

Iowa Code Section 476.29(2) (1995) relates to the requirement that a utility obtain a certificate of public convenience and necessity prior to commencing operation.

exchange carrier to impose restrictions on the resale of local exchange services, functions, or capabilities. The board may prohibit residential service from being resold as a different class of service.

In its Decision and Order, the Board found:

The catalog changes [made by US West] appear to allow resale of the described service. However, the Board must also consider the total effect of the course of conduct by US West in changing the terms of the offering. Measuring that course of conduct against Iowa Code § 476.101(7), the changes US West made to its Centrex Plus catalog substantially restrict the growth potential of McLeod, MCImetro, and TCSI as resellers and eliminate the possibility of resale of Centrex Plus service to future resellers such as AT&T at a time when no equivalent service is available. Although the subsequent agreements US West entered into with McLeod and TCSI lessened the restrictions, Centrex Plus service continued to be available to them only on a more restrictive basis than previously offered; Centrex Plus service continued to be available to MCImetro only on the basis of the catalog changes. The course of conduct of US West evidenced by both the catalog changes and the subsequent agreements with McLeod and TCSI resulted in restrictions on the resale of Centrex Plus local exchange service. The effect of these changes was to allow US West to gain control over the degree to which its competitors could grow and to lock out potential resale competitors. US West thus violated Iowa Code § 476.101(7).

In Re: McLeod TeleManagement, Inc., Docket Nos. FCU-96-1 & FCU-96-3, Decision and Order, pp. 6-7 (June 14, 1996).

US West argues that it has not placed any restrictions on the resale of Centrex Plus in violation of Iowa Code Section 476.101(7). It suggests the restrictions are on the product itself, not the resale of the product. However, Anthony J. DiTirro, a Regulatory Manager for MCI Telecommunications Corporation, testified to the contrary:

ATTORNEY HOLZ: In the absence of the stay that's in place for you, when you purchase the US West product which would be offered, as you have purchased that product, has US West placed any further limitations on your resale of the product which you have purchased?

THE WITNESS: Yes, they have both limited the number of common blocks we can sell -- we can get from US West,

therefore we can't provide those common blocks to customers, and they have limited the number of additional lines we can add to existing customers, which limits our ability to resell to certain customers, to our existing customers.

ATTORNEY HOLZ: Again, that is a limitation which is stated within the product which is made available to you by US West?

THE WITNESS: And that creates a limitation on our ability to resell, so the answer to your question is yes, US West action does limit your (sic) ability to resell.

ATTORNEY HOLZ: US West has not made any statement that you cannot resell our product?

THE WITNESS: I would have to review everything you've said, but you've said that we can't buy the product as we used to buy it before you filed to withdraw the grandfather (sic), therefore that has the effect of preventing us from resale.

Tr. pp. 86-87 (emphasis added).

As this Court stated in the prior section, the catalog changes imposed by US West on Centrex Plus effectively shut out potential competitors who do not already offer Centrex Plus and inhibit the growth of resellers who currently subscribe to the service. This constitutes a restriction on resale in violation of Iowa Code Section 476.101(7) (1995 Supp.).

US West further argues Iowa Code Section 476.101(7) (1995 Supp.) does not give the Board "veto power" over what US West characterizes as a "business decision" simply because the decision may adversely impact competition. The Court disagrees. US West's interpretation of Iowa Code Section 476.101(7) would effectively neutralize the statute as any changes made to a product could be characterized as a "business decision" and thus beyond the Board's reach. The entire thrust of H.F. 518 is to foster competition in the telecommunications market. The procompetitive purposes of the legislation are set out in

subsection 6, now Iowa Code Section 476.95 (1995 Supp.), and are discussed earlier in this opinion. The Board's authority to hear complaints concerning violations of Section 476.101(7) is granted by Iowa Code Section 476.101(8) and is limited only by the Board's enabling legislation. See also Northwestern Bell Telephone Co. v. Iowa Utilities Board, 477 N.W.2d 678 (Iowa 1991) (board action with regard to regulated service will not be deemed an interference with utility's management prerogative when board's action is taken pursuant to legislative grant of authority).

For the reasons set out above and those discussed in the prior sections, this Court finds the Board correctly concluded that US West restricted the access of McLeod, TCSI and MCImetro and precluded the access of AT&T to Centrex Plus services for resale in violation of Iowa Code Section 476.101(7) (1995 Supp.). The Board's decision is amply supported by substantial evidence and is correct as a matter of law.

3. *US West Discrimination in Favor of Itself in Violation of Iowa Code Section 476.100(7).*

Iowa Code Section 476.100(7) provides that a local exchange carrier shall not:

7. Discriminate in favor of itself or an affiliate in the provision and pricing of, or extension of credit for, any telephone service.

The changes made to US West's Centrex Plus catalog clearly restricted the ability of its competitors to offer the product for resale and precluded new competition from entering that market. After imposing the catalog changes, US West then entered into agreements with McLeod and TCSI to provide Centrex Plus service to those two resellers on different terms than those offered in the catalog. The Board found:

The effect of these agreements gave McLeod and TCSI the ability to use Centrex Plus on terms that were less restrictive than the catalog terms under

which MCImetro continued to operate. By this conduct, US West favored the resellers of its choice to the disadvantage of others, thus violating Iowa Code § 476.100(7).

In Re: McLeod TeleManagement, Inc., Docket Nos. FCU-96-1 & FCU-96-3, Decision and Order, pp. 7-8 (June 14, 1996).

The Board specifically stated that it was not suggesting that US West could never discontinue a service which was being resold by competitors. It did, however, state that if a service was discontinued, it must be done in a manner consistent with the procompetitive requirements of Iowa Code Sections 476.100 and 476.101 (1995 Supp.). Id. at 8.

The Court agrees with the Board's statement that any discontinuation of service must be done in a manner consistent with the procompetitive requirements of the statute, and with the Board's finding that US West violated Iowa Code Section 476.100(7) (1995 Supp.). The conduct of US West favors certain resellers of Centrex Plus to the advantage of other resellers. It discriminates against other providers by refusing or delaying access to Centrex Plus. This allows US West to control who its competitors will be and how they will compete. US West stands to benefit from the changes to its Centrex Plus catalog and its agreements with McLeod and TCSI because to the extent these changes inhibit competition they favor the incumbent local exchange carrier. In this way, US West discriminates in favor of itself in the provision of telephone service. The Board correctly concluded US West violated Section 476.100(7). The Board's decision is supported by substantial evidence.

VI. CONCLUSION

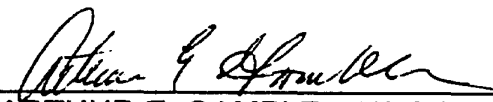
The Court concludes the Board did not act in excess of its statutory authority in failing to dismiss MCImetro's Complaint for lack of jurisdiction. The Board's conclusions

that the actions of US West violated Iowa Code Sections 476.100(1), 476.100(7) and 476.101(7) (1995 Supp.) are supported by substantial evidence. The decision of the Board is not affected by error of law nor is it in violation of constitutional or statutory limits. It is not unreasonable, arbitrary or capricious.

VII. RULING

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED the June 14, 1996, Decision and Order of the Board is affirmed. US West's Petition For Judicial Review is dismissed. US West shall pay the court costs.

Dated this 21st day of February, 1997.


ARTHUR E. GAMBLE, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

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